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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8 CARRIE FERRARA CLARK,

9 Plaintiff,

10 vs.

11 CITY OF TUCSON,

12 Defendant.

Case No. 4:14-CV-02543-TUC-CKJ

**STIPULATION REGARDING
PRELIMINARY JURY
INSTRUCTIONS**

Hon. Cindy K. Jorgenson

14 Counsel for the parties, having met and conferred, in addition to the preliminary jury
15 instructions reviewed at the Pretrial Conference on March 19, 2019, submit the attached
16 stipulated Preliminary Jury Instructions to be used at trial.

17
18 DATED this 28th day of March, 2019.

19 **MICHAEL G. RANKIN**

20 City Attorney

21 s/ Renee Waters

Renee Waters

22 Principal Assistant City Attorney

JACOBSON LAW FIRM

s/ Jeffrey H. Jacobson

Jeffrey H. Jacobson

Attorney for Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2019, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Michelle Saavedra
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MODEL NINTH CIRCUIT INSTRUCTIONS

10.1 CIVIL RIGHTS - TITLE VII - DISPARATE TREATMENT - WHEN EVIDENCE SUPPORTS “SOLE REASON” OR “MOTIVATING FACTOR”

Plaintiff has brought a claim of employment discrimination against the Defendant. Plaintiff claims that her sex was either the sole reason or a motivating factor for the Defendant’s decision to take an adverse employment action against her.

Defendant denies that Plaintiff’s sex was either the sole reason or a motivating factor for any of its actions and further claims the Defendant’s actions were based on lawful reasons.

1 **10.2 CIVIL RIGHTS - TITLE VII - DISPARATE TREATMENT - “SOLE**
2 **REASON” - ELEMENTS AND BURDEN OF PROOF**

3 As to the Plaintiff’s claim that her sex was the sole reason for the any of the
4 Defendant’s adverse employment actions, Plaintiff has the burden of proving both of the
5 following elements by a preponderance of the evidence:

- 6 1. Plaintiff was subject to an adverse employment action by the defendant; and
- 7 2. the Plaintiff was subjected to an adverse employment action solely because of the
8 Plaintiff’s sex.

9 If you find that the Plaintiff has proved both of these elements, your verdict should
10 be for the Plaintiff. If, on the other hand, the Plaintiff has failed to prove either of these
11 elements, your verdict should be for the Defendant.

1 **10.3 CIVIL RIGHTS - TITLE VII - DISPARATE TREATMENT - “MOTIVATING**
2 **FACTOR” - ELEMENTS AND BURDEN OF PROOF**

3 As to Plaintiff’s claim that her sex was a motivating factor for Defendant’s adverse
4 employment actions, Plaintiff has the burden of proving both of the following elements by a
preponderance of the evidence:

- 5 1. Plaintiff was subject to an adverse employment action by the defendant; and
- 6 2. Plaintiff’s sex was a motivating factor in Defendant’s adverse employment action
7 against the Plaintiff.

8 If you find that Plaintiff has failed to prove either of these elements, your verdict
9 should be for Defendant. If the Plaintiff has proved both of these elements, the Plaintiff is
10 entitled to your verdict, even if you find that the Defendant’s conduct was also motivated
11 by a lawful reason. If, however, the Defendant proves by a preponderance of the evidence
that the defendant would have made the same decision even if the Plaintiff’s sex had played
no role in the employment decision, your verdict should be for the Defendant.

1 **10.8 CIVIL RIGHTS - TITLE VII – RETALIATION - ELEMENTS AND BURDEN**
2 **OF PROOF**

3 The Plaintiff seeks damages against the defendant for retaliation. The Plaintiff has
4 the burden of proving each of the following elements by a preponderance of the evidence:

5 1. The Plaintiff:

6 participated in an activity protected under federal law

7 *or*

8 opposed an unlawful employment practice; and

9 2. Defendant subjected Plaintiff to an adverse employment action; and

10 3. Plaintiff was subjected to the adverse employment action because of her
11 participation in a protected activity and/or opposition to an unlawful employment
12 practice.

13 A Plaintiff is “subjected to an adverse employment action” because of her
14 participation in a protected activity and/or opposition to an unlawful employment practice if
15 the adverse employment action would not have occurred but for that participation and/or
16 opposition.

17 If you find that the Plaintiff has proved all three of these elements, your verdict
18 should be for the Plaintiff. If, on the other hand, the Plaintiff has failed to prove any of these
19 elements, your verdict should be for the Defendant.
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NON-PATTERN JURY INSTRUCTIONS

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Title VII - Pregnancy and Related Medical Conditions

Under federal law, the term “sex” includes, but is not limited to, pregnancy, childbirth, and medical conditions related to pregnancy and childbirth, such as breast feeding. The law also provides that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work.”

1 **Fair Labor Standards Act (FLSA) – Retaliation – 29 U.S.C. § 215**

2 In this case, Plaintiff claims that Defendant retaliated against her because she took
3 steps to enforce her lawful rights under the Fair Labor Standards Act (FLSA) which
4 requires Defendant to provide a place, other than a bathroom, that is shielded from view and
5 free from intrusion from coworkers and the public, which could be used by her to express
6 breast milk.

7 Laws that prohibit discrimination in the workplace also prohibit an employer from
8 taking any retaliatory action against an employee because the employee has participated in
9 an activity protected under federal law, that is asserting rights or making discrimination
10 complaints, or by opposing an unlawful employment practice, that is, failing to provide a
11 space, that complies with federal law, to express her breast milk.

12 An employee may make a discrimination complaint as a means to enforce what she
13 believed in good faith to be her lawful rights. So, even if a complaint of discrimination
14 against an employer is later found to be invalid or without merit, the employee cannot be
15 penalized in retaliation for having made such a complaint if you find that the employee
16 made the complaint as a means of seeking to enforce what the employee believed in good
17 faith to be her lawful rights. To establish “good faith,” however, it is insufficient for
18 Plaintiff merely to allege that her belief in this regard was honest and bona fide; the
19 allegations and the record must also establish that the belief, though perhaps mistaken, was
20 objectively reasonable.

21 To succeed on her claims, Plaintiff must prove each of the following facts by a
22 preponderance of evidence:

- 23 1. Plaintiff participated in an activity protected under federal law, that is, asserting her
24 rights or filing a discrimination complaint

25 *or*

26 Plaintiff opposed an unlawful employment practice, that is, failing to provide a space
to express her breast milk that complied with federal law; and

2. Defendant then subjected Plaintiff to an adverse employment action; and
3. Defendant took the adverse employment action because of Plaintiff’s participation in
a protected activity or opposition to an unlawful employment practice.

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Protected Activity – Participation – Defined

An action is “protected activity” if it was based on Plaintiff’s good-faith, reasonable belief that the Defendant discriminated against her because of her sex. Plaintiff had a “good faith” belief if she honestly believed that the Defendant discriminated against her because of her sex.

Protected activities include making a charge of discrimination or retaliation, or testifying, assisting or otherwise participating in any manner in her own charge of discrimination or retaliation, investigation, proceeding, or hearing under Title VII.

Plaintiff had a “reasonable” belief if a reasonable person would, under the circumstances, believe that the City of Tucson discriminated against her because of her sex. Plaintiff does not have to prove that the City of Tucson actually discriminated against her because of her sex. But she must prove that she had a good-faith, reasonable belief that the City of Tucson did so.

1 **Protected Activity – Opposition (Mistaken but Reasonable Good Faith Belief)**

2 Plaintiff Carrie Clark’s activity in opposing a practice she believed to be unlawful
3 under either Title VII or the FLSA is protected activity even if it is based on a mistaken but
4 reasonable good faith belief that the City of Tucson discriminated against her on the basis
of sex and retaliated against her.

5 In this case, Plaintiff asserts that she opposed a practice she believed unlawful when
6 she repeatedly opposed being assigned to stations that did not have a lactation space,
shielded from view and free from intrusion.

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Motivating Factor – Defined

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2 Plaintiff is not required to prove that her sex was the sole or exclusive motivating
3 factor for the Defendant’s decisions or even the primary motivation for the Defendant’s
4 decisions. Plaintiff is also not required to prove that all of the Defendant’s stated reasons for
5 the decisions were false. Plaintiff must prove that her sex was a motivating factor. That is,
6 Plaintiff’s sex was a factor that made a difference in the Defendant’s actions and decisions
7 involving Plaintiff’s employment.

8 In determining whether Plaintiff’s sex was a “motivating factor” in the Defendant’s
9 actions and decisions involving Plaintiff’s employment, you may consider any statements
10 made or acts done or admitted by the Defendant, and all other facts and circumstances in
11 evidence indicating state of mind. An improper motive, if it exists, is seldom directly
12 admitted and may or may not be inferred from the existence of other facts.
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Mixed Motive

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2 You have heard evidence that the Defendant’s treatment of Plaintiff may have been
3 motivated by a desire to discriminate against her, and also by other lawful reasons. If you
4 find that discrimination was a motivating factor in the Defendant’s employment actions and
5 decisions, as determined by direct or circumstantial evidence, then Plaintiff is entitled to
6 your verdict even if you find that the decision was also motivated by a non-discriminatory
7 reason.

8 However, if you find that the Defendant was motivated by both discriminatory and
9 non-discriminatory reasons, you must decide whether Plaintiff is entitled to damages.
10 Plaintiff is entitled to damages unless the Defendant proves by a preponderance of evidence
11 that it would have treated Plaintiff the same even if discrimination had played no role in the
12 Defendant’s employment actions and decisions.
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Retaliation – Statute Involved (Title VII)

Plaintiff claims that the Defendant retaliated against her in violation of Title VII. The purpose of Title VII is to protect the rights of individuals to be free from workplace discrimination and harassment based on race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information. The anti-retaliation protection in Title VII provides that it is unlawful for an employer to retaliate against an individual because she in good faith opposed what she believed were discriminatory or retaliatory employment practices or because she has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing governed by Title VII.

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Retaliation – Statue Involved (FLSA)

Plaintiff claims that the Defendant retaliated against her in violation of the Fair Labor Standards Act (FLSA). The anti-retaliation protection in the FLSA provides that it is unlawful for an employer to retaliate against an individual because she in good faith opposed what she believed were discriminatory or retaliatory employment practices or because she has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing governed by the FLSA.